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SUPREME COURT OF THE UNITED STATES

No. 1004

319 U.S. # 17
KEA-LOC

KEAL DRIVEWAY COMPANY, a corporation, and R. S. BUNNELL,

Petitioners,

versus

CAR & GENERAL INSURANCE CORPORATION, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE FIFTH CIRCUIT

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Of Counsel.

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I.

Your petitioners, Keal Driveway Company, a corporation, and R. S. Bunnell, pray that a writ of certiorari issue to the United States Circuit Court of Appeals, Fifth Circuit, to review its judgment rendered January 20, 1943 (R. 192), rehearing refused February 12, 1943, reversing judgment of the United States District Court for the Southern District of Florida (R. 39).

II.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Your petitioners were defendants in an action wherein Car & General Insurance Corporation, as subrogee under the Florida Workmen's Compensation Act, sued on its own behalf and on behalf of Ralph Campbell to recover damages for personal injuries sustained by Campbell in an automobile accident. (R. 1).

The cause coming on for trial, the jury found, in answer to interrogatories submitted to it by the Court, that the defendants were guilty of negligence and likewise Campbell was guilty of contributory negligence (R. 37) and judgment for petitioners was entered under the Florida rule that contributory negligence constitutes a complete defense. (R. 39).

Appeal was taken by the respondent (R. 177), and the Circuit Court of Appeals reversed the judgment by a divided opinion, (R. 186-189) Judge Hutcheson filing a dissenting opinion (R. 190), officially reported in 132 F. (2d) 834), upon the sole ground that the refusal of the lower court to give charges requested by the respondent dealing with the doctrine of sudden emergency was erroneous.

Campbell's testimony, upon which respondent necessarily predicated its right to invoke the emergency doctrine, disclosed he was traveling north and petitioners' vehicles in a southerly direction on a straight 20-foot concrete highway (R. 83), at 10:00 A. M., when the vehicles collided in approximately the middle of the pavement. He

testified that when he was a quarter of a mile distant, he saw petitioners' approaching automobile directly in his pathway (R. 58), running off the pavement and then back on (R. 49); that when it was some 250 or 300 feet distant, he noticed no one was at the wheel (R. 59). He further testified that at no time did he swing his car toward the shoulder or swerve it in any but continued driving straight forward (R. 62, 63) at a speed of 45 to 50 miles per hour (R. 50) until the accident occurred, although he distinctly saw that there was no one at the steering wheel and closely observed the approaching car to see how it was running automatically (R. 60).

There was no testimony which indicated, in the slightest degree, that Campbell at any time considered he was in peril or in any wise changed his speed or course. The evidence clearly negatived the existence of any sudden peril inasmuch as Campbell had been engaged in pondering, out of curiosity, the phenomenon of a self-operating automobile (R. 60). He admitted that during the period subsequent to his observance of petitioners' automobile, a quarter mile away, he took no steps for his own safety and his testimony demonstrates that his conduct was not influenced by terror (R. 58-63).

At the conclusion of respondent's case and also at the close of the entire evidence, your petitioners duly made motion for a directed verdict upon the ground that the evidence disclosed that Campbell was guilty of contributory negligence as a matter of law (R. 119 and 27). The trial Court reserved ruling upon these motions and in view of the jury's finding never had occasion to pass thereon.

III.

JURISDICTION OF THIS COURT is asserted under Section 240a of the Judicial Code, as amended by the Act of February 13, 1925, 43 Statutes 938 (U.S.C.A. Title 28, Sec. 347a).

The opinion of the Circuit Court of Appeals was rendered on the 20th day of January, 1943 (R. 186). Thereafter your petitioners filed a petition for rehearing (R. 193), which was, by order of the appellate court, denied on the 12th day of February, 1943 (R. 199).

Department of Banking v. Pink, 87 L. Ed. 218.

IV.

THE QUESTIONS PRESENTED ARE AS FOLLOWS:

1. Should the jury be instructed on the sudden emergency doctrine when the evidence discloses (a) that the party requesting such charge has by his own negligence contributed to causing the emergency, (b) the conditions which finally culminated in an emergency having been actually observed for an appreciable time, (c) where such party did not apprehend the existence of peril and (d) did not act in extremis, and when the Florida rule, under the stated circumstances, is to the effect that the emergency doctrine is inapplicable.

2. Should instructions on the emergency doctrine be given which fail to include the qualification, required under the Florida law, that such doctrine is applicable only

in the event the emergency had arisen without previous negligence on the part of the party invoking same?

3. Is a person guilty of contributory negligence, as a matter of law, when he voluntarily exposes himself to the unreasonable risk incident to an approaching automobile which he clearly observes is out of control and running without a driver?

4. Where the effect of the decision of the Circuit Court of Appeals is such as to constitute precedent that the emergency doctrine is applicable in every case merely upon proof of the existence of sudden peril, should this Court exercise its supervisory power in order to prevent serious hindrance in the future administration of the law in this state?

V.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The following reasons are relied upon for the issuance of the writ of certiorari:

1. The conclusion, as set forth in the majority opinion, is in direct conflict with the applicable law on the emergency doctrine as enunciated by the Florida Court in the cases of Hainlin v. Budge, 56 Fla. 342, 47 So. 825, and White v. Hughes, 139 Fla. 54, 190 So. 446. It is submitted that the evidence in this case, when viewed in the light of the Florida law, presented no basis whatever for the application of the sudden peril doctrine.

2. The law of this case, as expressed in the majority opinion, is that the defense of sudden emergency is available notwithstanding the emergency resulted from the claimant's previous contributory negligence, inasmuch as the requested instructions contained no qualification that the emergency must have arisen without Campbell's prior negligence. This omission rendered the charges fatally defective under the Florida law and also under the subsequent announcement of the Fifth Circuit Court of Appeals in Shell Oil Co. v. Slade, 133 F. (2d) 519.

3. The evidence, as a matter of law, conclusively established that Campbell was guilty of negligence in voluntarily exposing himself to an unreasonable risk, which negligence proximately contributed to occasioning the accident. The point was presented to the Circuit Court of Appeals which declined to follow the Florida law, as well as the general law, and erroneously held the issue of contributory negligence was for the jury.

4. The decision rendered is of such nature as to call for the exercise of this Court's power of supervision in order to prevent serious hindrance in the future administration of the law in the State of Florida inasmuch as the announcements contained in the majority opinion, when viewed in the light of the facts of the case, necessarily warrant the injection of the issue of sudden emergency in substantially all automobile damage actions.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari do issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, Fifth Circuit, commanding that Court to certify and send to this Court for its review and

determination on a day certain to be therein named, a transcript of the record and proceedings herein, and that the judgment herein of the said Circuit Court of Appeals, Fifth Circuit, be reversed by this Honorable Court and your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

R. W. SHACKLEFORD
Attorney for Petitioners.

Shackleford, Farrior & Shannon,
of Counsel.

SUPREME COURT OF THE UNITED STATES

No.

KEAL DRIVEWAY COMPANY, a corporation, and R. S. BUNNELL,

Petitioners,

versus

CAR & GENERAL INSURANCE CORPORATION, a corporation,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

It is our contention that the Circuit Court of Appeals in reversing the judgment, upon the sole ground that the District Court erred in refusing to instruct the jury upon the sudden emergency doctrine, declined to follow the applicable Florida law.

I.

THERE WAS NO BASIS, IN THE EVIDENCE, FOR THE APPLICATION OF THE EMERGENCY DOCTRINE UNDER THE FLORIDA LAW

In Hainlin v. Budge, 56 Fla. 342, 47 So. 825, the Florida Court approved an instruction wherein the conditions

under which the rule of sudden peril may be invoked were set forth and in the opinion the court said:

> "We find the requested instruction, which was refused, was taken verbatim from the case of Lincoln Rapid Transit Company v. Nichols, 37 Neb. 332, text 336, 55 N. W. 872, text 873, 20 L.R.A. 853, text 855. The instruction in the cited case was given by the trial judge, and the Supreme Court of Nebraska in a well-reasoned opinion held that no error was committed in giving the same, saying that: 'This instruction told the jury, in effect, that if they found that Mrs. Nichols, while placed in a dangerous situation through the transit company's negligence, *was frightened and in terror, and acted carelessly and was injured*, her conduct under such circumstances was not contributory negligence, as a person in great peril is not required to exercise the care demanded of a careful person under ordinary circumstances.' It is further said in the opinion: *'A choice of evils may often be all that is left to a man, and he is not to blame if he chooses one, nor if he chooses the greater, if he is in circumstances of difficulty and danger at the time and compelled to decide hurriedly'*". (Emphasis ours.)

In White v. Hughes, 139 Fla. 54, 190 So. 446, the Florida Court tersely enunciated the essential factors as (1) suddenness of the peril, (2) an awareness thereof on the part of the plaintiff, (3) action resulting from the impending danger and (4) that the emergency was created by the negligence of the defendant.

An examination of the charges, which were here refused by the District Court (R. 179), will disclose the absence of factors 2, 3, and 4. Quick reference to Campbell's testimony (R. 58 to 63), or the synopsis thereof as set forth in Judge Hutcheson's dissenting opinion (R.

190), will convince the Court that although Campbell was necessarily aware of danger from the oncoming car when it was yet one quarter of a mile away, he took no steps for his own safety and at no time considered himself in peril, nor was his conduct affected by any factor, as his testimony demonstrates that he drove calmly on in his previous pathway, until the accident occurred.

> "This is not a case in which one, placed in a position of danger through the negligence of the company, confused by his surroundings, makes perhaps a mistake in choice as to the way of escape, and is caught in an accident".

Elliott v. Chicago etc. R. Co., 37 L. Ed. 1068, 150 U. S. 245, 14 S. Ct. 85.

II.

AS THE REQUESTED INSTRUCTIONS OMITTED THE ESSENTIAL QUALIFYING PROVISION THAT THE EMERGENCY RULE IS APPLICABLE ONLY IN THE EVENT THE EMERGENCY HAD ARISEN WITHOUT PRIOR NEGLIGENCE ON THE PART OF CAMPBELL, THEY WERE NECESSARILY REFUSED.

In Hainlin v. Budge, supra, the charge which was approved by the Court, set forth the qualifications in the following language:

> "If you believe from the evidence herein that the plaintiff, through the negligence of the defendant, was placed in a situation where she must adopt a perilous alternative, or where, in the terror of an emer-

gency, *for which she was not responsible and for which the defendant was responsible, she acted wildly*" * *. (Emphasis ours.)

In Shell Oil Co., Inc. v. Slade, 133 F. (2d) 518, (opinion February 2, 1943, rehearing denied March 12, 1943) the following statement of the rule was made by the Fifth Circuit Court of Appeals:

> "Nor may appellees rely, as they seek to do, upon the doctrine of sudden emergency both because the evidence establishes without dispute that the deceased had full warning of the dangers in ample time to provide against them and because the defense of sudden emergency is never available where that emergency is the result of the claimant's previous contributory negligence".

The authorities are unanimous in condemning an instruction on the emergency doctrine which fails to charge the jury that the doctrine is applicable only in the event the emergency arose without prior negligence.

See: Carpenter v. Campbell Automobile Co., 140 N.W. 225 (Ia.); Bolton v. Wells, 225 N. W. 791 (N.D.); Dodds v. Gifford, 16 P. (2d) 279 (Cal.); Alaga Coach Line, Inc. v. Foy, 150 So. 493 (Ala.); Prevost v. Smith, 197 So. 905 (La.); Gajewski v. Lightner, 19 A. (2d) 355 (Pa.); Iverson v. Knorr, 298 N.W. 28 (S.D.); Hill v. Walters, 100 P. (2d) 98 (Wyo.); Bybee Bros. v. Imes, 155 S.W. (2d) 482 (Ky.); French v. Nelson, 17 A. (2d) 323 (Vt.); Pickard v. Morris, 13 A. (2d) 609 (N.H.); Ackles v. Lane, 35 P. (2d) 200 (Cal.); Moore v. East St. Louis etc. R. Co., 54 S.W. (2d) 267 (Mo.); Cottrill v. Pinkerton, 248 N.W. 124 (Wis.); Vedder v. Bireley, 267 P. 724 (Cal.) and Landry v. Hubert, 137 A. 97 (Vt.).

III.

THE EVIDENCE ESTABLISHED, AS A MATTER OF LAW, THAT CAMPBELL WAS GUILTY OF CONTRIBUTORY NEGLIGENCE, AND VERDICT SHOULD HAVE BEEN INSTRUCTED.

Campbell's testimony shows that he voluntarily confronted the grave peril of a motor vehicle running at a high rate of speed which he knew was out of control when it was yet one quarter mile away (R. 49) and which he discovered when it was 250 to 300 feet distant was driverless, without taking any steps for his own safety. The evidence discloses that the shoulder of the roadway was of such character (R. 84) as to present a harbor of safety but that Campbell made no effort to avail himself thereof, nor did he reduce his speed but on the contrary, held to his prior pathway, thus plunging "headlong upon a nuisance".

Such conduct was held to preclude recovery under an announcement of the Florida Court made in 1850 in City of Tallahassee v. Fortune, 3 Fla. 19, page 26:

> "Parker, Ch. J., says, in the case of Smith v. Smith, 2 Pick. 624 'to entitle the plaintiff to an action of damages resulting from a nuisance, he must show that he acted with common and ordinary care.' And so we take the law to be; *if a person should go headlong with his beast upon a nuisance, which (with ordinary care) he might have avoided, he ought not to have damages for his loss in consequence of his own recklessness*' ". (Emphasis ours.)

In Lindsay v. Thomas, 128 Fla. 293, 174 So. 418, contributory negligence was thus defined:

> " 'Contributory negligence' is conduct which involves an undue risk of harm to the person who sustains it. A voluntary exposure of oneself to an unreasonable risk is such contributory negligence where a reasonable man in the same position would not so expose himself. American Law Institute, Torts (Negligence), chapter 17, p. 1224 et seq".

See Stanford v. Atlantic Life Insurance Co., 109 F. (2d) 428, wherein the Fifth Circuit Court of Appeals quoted and applied the above definition to preclude recovery.

See also: Clyde Bar, Inc. v. McClamma, ... Fla. ....., 10 So. (2d) 916; Matson v. Tip Top Grocery Co., ... Fla. ....., 9 So. (2d) 366; Tutwiler v. Beverally Nalle Inc., ... Fla. ....., 12 So. (2d) 163; City of Miami v. Saunders, ... Fla. ....., 10 So. (2d) 326; General Outdoor Advertising Co. v. Frost, 76 F. (2d) 127 (5th Cir., Fla.); Baltimore & Potomac R. R. Co. v. Jones, 95 U. S. 439, 24 L. Ed. 506; Elliott v. Chicago, etc. Co., 37 L. Ed. 1068, 150 U. S. 245, 14 S. Ct. 85.

For discussion of identical factual situation, see Iverson v. Knorr, 298 N. W. 28 (S.D.).

IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS OF SUCH NATURE AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION IN ORDER TO PREVENT THE INJECTION OF THE ISSUE OF SUDDEN

EMERGENCY IN ALL AUTOMOBILE DAMAGE ACTIONS.

There is but little doubt that most persons who are injured in automobile accidents are confronted with a sudden peril but that fact, in and of itself, does not justify the application of the emergency doctrine.

In the case of Feck's Adm'r. v. Bell Line, Inc., 144 S.W. (2d) 483 (Ky.), the Court in discussing the identical situation here presented said:

> "It is not in every accident case however, that an instruction of the character contended for should be given — —. As a matter of fact it might be said that most persons injured in accidents are confronted with a sudden peril, otherwise, as a rule, there would be no injury since, if the peril were not sudden, the injured party would ordinarily have time to avoid it.

The statement of the court in Kiddle v. Schnitzer, 114 P. (2d) 109 (Ore.), is equally applicable to the instant case:

> "To hold in this instance that the circuit court should have instructed the jury with particular reference to the emergency doctrine would establish a precedent requiring a similar instruction to be given, if requested, in practically every case involving a motor vehicle accident".

We urge this Court to exercise its power of supervision to prevent the serious hindrance in the future administration of the law, in this state, which will follow from the unwarranted precedent established by the decision of the Circuit Court of Appeals. Further, if the judgment be not reversed, the District Judge will be required, at the

re-trial of this action, to instruct the jury on the doctrine of sudden emergency, even though there again be no basis in the evidence warranting such charge.

We respectfully submit for the reasons stated in the petition and this brief, that the application for writ of certiorari should be granted.

R. W. Shackleford,
Attorney for Keal Driveway Company, a corporation, and R. S. Bunnell, Petitioners.

Shackleford, Farrior & Shannon,
Tampa, Florida, of Counsel.

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No. 1,004,
OCTOBER TERM 1942

KEAL DRIVEWAY COMPANY, a corporation, and R. S. BUNNELL,

Petitioners,

versus

CAR & GENERAL INSURANCE CORPORATION, a corporation,

Respondent.

BRIEF OF RESPONDENT

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IN THE

Supreme Court of the United States

No. 1,004,

OCTOBER TERM 1942

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CAR & GENERAL INSURANCE CORPORATION, a corporation,

Respondent.

BRIEF OF RESPONDENT

REPLY TO PETITION

Jurisdiction of this Court is asserted by petitioners under Section 240a of the Judicial Code, as amended by the Act of February 13, 1925, 43 Statutes 938 (U.S.C.A. Title 28, Sec. 347a), and it is claimed by them that the decision of the Circuit Court of Appeals is in conflict with applicable local decisions.

A short review of the essential facts in this case is a complete answer to the petition, and will also explain the basis of the decision of the Circuit Court of Appeals,

which reversed the decision of the Trial Judge for failure to give requested instructions on the subject of sudden peril or imminent danger. For the sake of brevity and convenience, I will refer to petitioners as defendants, and to respondent as plaintiff.

Plaintiff alone, driving a Ford sedan, and defendant alone, driving two automobiles fastened together tandem fashion, were approaching each other from opposite directions at about ten o'clock in the morning on a clear day upon a straight, level highway, paved with concrete and twenty feet wide and with a center stripe down the middle. Neither was driving at an excessive rate of speed and they had a head-on collision. This colllision was not in the middle of the pavement as asserted by petitioners, but was definitely over on plaintiff's right hand side of the center stripe, or definitely on defendant's right hand side of the center stripe. There were no eye witnesses and, as to the above, there was no conflict in the evidence except as to the side of the highway where the colllision occurred. (Tr.-49 et seq.—Tr.-136 et seq.)

When plaintiff first saw defendant's tandem it was about one-quarter of a mile away and was on its left side of the road, but it turned back immediately and in doing so ran to its right side of the road. (Tr.-49).

There never has been any contention that plaintiff should have stopped or left the road on account of the conduct of the tandem one-quarter mile away. From then on then on the situation was normal until the cars were about from one to two hundred feet apart and then the plaintiff noticed that defendant's driver had slumped down away from the wheel and was not in sight.

"Q. And you came to that realization when the car was 100 to 200 feet away from you?

A. Yes sir." (Tr.-62)

At the rate of speed both drivers were traveling, it was less than one second later that the collision occurred. Plaintiff swore that when defendant's tandem was just a few feet away, it lunged across the center stripe and hit him head on. (Tr.-49). Defendant's driver swore to exactly the reverse, that just before they met, plaintiff crossed the center stripe and hit him head-on. (Tr.-136). Each driver swore that he always stayed on his side of the road. Mr. Campbell said:

"Q. Did you ever at any time get across on the left hand side of the road after you first saw the automobile approaching?

A. No sir." (Tr.-50)

Defendant's driver also testified.

"——and when he came within two or three car lengths of my car, he suddenly swerved in my direction.——"

"Q. At the time of the impact, what, Mr. Bunnell, was the position of your car or cars on the highway?

A. My car was straight down the road.

Q. What side of the road?

A. On my side of the highway." (Tr.-136)

The only material conflict in the evidence was as to where the collision took place. Each driver asserted vigorously that he remained on his side of the road and that the other crossed to his side and hit him. Therefore, there was no question of contributory negligence involved in the

case. It was simply a question as to which driver's conduct was the sole, proximte cause of the collision. However, the learned trial judge thought that even if the plaintiff's version was true, he might be guilty of negligence in failing to stop or in failing to turn off the highway in the interval of time between the time when he first realized that there was no one at defendant's wheel, and the time of the collision. At the rate of speed both drivers were traveling, this time was about one second. In his charges, the trial judge said:

> "Now whether or not Mr. Campbell was negligent from that instant on, and whether his negligence if any contributed proximately to the cause of accident it is for you gentlemen to determine; and his conduct—Mr. Campbell's conduct, in the operation of his car by him from that time on, when he observed—as he stated to you that he observed—that there was no one at the control of the defendant's car—his conduct from there on is to be measured by what a man of ordinary prudence and care would have done under like circumstances." (Tr.-169-170).

When plaintiff first noticed that no one was visible at the wheel of the oncoming tandem, his first feeling was one of curiosity (Tr.-60). This was quite natural. The tandem was only about twenty feet away from plaintiff when it turned and started across the center stripe. In estimating the position of the tandem when it turned, plaintiff said:

> "It could have been 20 or 18 or 16 feet. But it was so close that I had no time to do anything." (Tr.-63)

ARGUMENT

If the exercise of due care required plaintiff to do something in order to avoid a collision when he first realized that no driver was in sight back of the wheel, he had about one second to decide what to do and to do it. If he should have done something at the time the tandem turned towards him, he had only about 1/100 of a second to decide what to do and to do it. According to his evidence, the plaintiff did not realize that he faced a danger or peril, either sudden or otherwise, until the tandem turned towards him.

The trial judge told the jury that it was for them to decide if plaintiff acted with reasonable care during that period of time from when he first realized that no one was at the wheel until the time of the collision. In considering that question, the time element was of the utmost importance. The very pith of the situation was the suddenness of the peril or danger. Therefore, the court's charge in this case was misleading and incomplete unless it also included some reference to the time element involved and to the suddenness of the peril.

We took the position at the trial, and we still think we are correct, that no question or issue of contributory negligence was presented by plaintiff's testimony. That no one could reasonably assert that plaintiff was guilty of contributory negligence according to his own statement. That the only jury issue was which driver's conduct was the sole, proximate cause of the collision. Therefore, after the trial judge instructed the jury that plaintiff's version of the events transpiring during the last fraction of a second before the collision, might be contributory negligence, we requested, and the court refused, to give the following instructions.

"Gentlemen, I have previously charged you regarding ordinary care in cases of this kind. In addition to what I have already said on that subject I further charge you that ordinary care does not require one meeting an emergency to act at all events, where he has no time to decide what to do or to think of anything to do; and, if you find from the evidence in this case, that Mr. Campbell had no time in which to decide what to do or think of anything to do between the time he discovered, as he says, that no one was operating Mr. Bunnell's car and the time of impact of the two cars then Mr. Campbell would not be guilty of contributory negligence and you should so find." (Tr.-41.)

"When one is required to act suddenly and in the face of imminent danger, he is not required to act as if he had time for deliberation and the full exercise of his judgment and reasoning faculties. This is especially true where the peril has been caused by the fault of another. Ordinary care to avoid injury is all that is required. The test is, did he act as a reasonably prudent man would have acted under the same or similar circumstances. When a person exercises the care and caution in an emergency which an ordinarily prudent person would have used under the same or similar circumstances he is not negligent merely because he fails to exercise the best judgment, or does not take the safest course, or take every precaution which from a careful review of the circumstances it appears he might have taken, or, in attempting to escape the danger under such circumstances put himself in a more dangerous position. Ordinary care does not require one meeting an emergency to act at all events,

where he has no time to decide what to do or to think of anything to do." (Tr.-42)

Now, there is nothing unusual or distinctive in the sudden emergency principle as treated and applied by the Florida decisions. The decisions on this subject follow the same rules as laid down in Corpus Juris and American Jurisprudence and other texts, as will appear from the following two quotations from recent decisions.

> "Negligence. Acts done under stimulus of sudden peril or in case of emergency requiring immediate action are not to be judged by same standard as that applicable where actor has ample time for reflection and intelligent choice of means."
> Headnote 5, Cook v. Lewis K. Liggett Co. Inc., 173 SO. 159, 127 Fla. 369.

> "Negligence. Person placed in sudden peril by negligence of others is not held to same degree of presence of mind and care which is required under ordinary circumstances."

> Headnote 10, Hull v. Laine, 173 So. 701, 127 Fla. 433.

The charges which we requested on this subject were taken almost verbatim from the text in 45 C. J. 710.

We contend that the decision of the Circuit Court of Appeals is not in conflict with the applicable local decisions on this subject, and the application for Writ of Certiorari should be denied.

Respectfully submitted,

K. I. McKAY,

Attorney for Respondent.

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